



CABLE & WIRELESS
USA

ORIGINAL

EX PARTE OR LATE FILED

Cable & Wireless USA, Inc.

8219 Leesburg Pike
Vienna
Virginia 22182

www.cwusa.com

Telephone (703) 790-5300

January 24, 2000

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 12th St., SW
TW-A325
Washington, D.C. 20554

RECEIVED
JAN 27 2000
FCC MAIL ROOM

RE: Ex Parte Presentation
Section 1.1206(b)(1)
In the Matter of Direct Access to the INTELSAT System,
(IB Docket No. 98-192).

Secretary Salas:

C&W USA, Inc., hereby files the attached comments with two copies to the above entitled docket as a written ex parte presentation. Comments to the Opposition to the Petitions for Reconsideration were due Friday, January 21, 2000. If you have any questions concerning this ex parte communication, please do not hesitate to contact me at 703-905-5785. Thank you.

Sincerely,

Paul W. Kenefick
Director, International Regulatory Affairs

Attachment

cc: Michael McCain (FCC)
Martha E. Heller (Wiley, Rein & Fielding)
Warren Y. Zeger (Comsat)
Kristen Verderame (BTNA)
Robert Koppel (MCI WorldCom)

No. of Copies rec'd 04
List ABCDE

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON DC 20554

RECEIVED
JAN 27 2000
FCC MAIN ROOM

In the Matter of)	
)	
Direct Access to the)	IB Docket No. 98-192
INTELSAT System)	File No. 60-SAT-ISP-97
)	
)	

COMMENTS OF CABLE & WIRELESS

Cable & Wireless USA, Inc. ("C&W"),¹ hereby files these comments in the above entitled docket² in support of BT North America Inc.'s ("BTNA") Petition for Reconsideration ("Petition")³ and, specifically, in opposition to the Commission's decision to deny affiliates of foreign Signatories direct access to INTELSAT for service between the U.S. and any foreign country in which the Signatory uses 50 percent or more of all INTELSAT capacity consumed in that country.⁴ In the Direct Access Order, the Commission ruled that such a restriction on foreign Signatories was necessary since they will have an incentive to lower the cost of providing service in the U.S. while also having

¹ C&W USA is wholly-owned by Cable & Wireless plc of the United Kingdom. C&W plc is one of the world's leading providers of integrated communications, offering Internet, data, voice, and video service to 17 million customers in over 70 countries. C&W plc was the first Duly Authorized Telecommunications Entity ("DATE") to obtain Level 4 (investment) access to INTELSAT.

² *In the Matter of Direct Access to the INTELSAT System, Report and Order*, IB Docket No. 98-192, File No. 60-SAT-ISP-97, released September 16, 1999 (hereinafter "Order"), *summary published in* 64 Fed. Reg. 54561 (October 7, 1999).

³ *BT North America, Inc., Petition for Reconsideration* ("Petition"), IB No. 98-192 (Nov. 8, 1999).

⁴ Order at ¶98. This rule will preclude C&W's direct access registrants from the benefits of INTELSAT direct access on the Jamaica and Barbados routes.

the ability to control the cost of service by their Signatory status.⁵ The Signatories will have an incentive to lower costs, through the INTELSAT Utilization Charge (“IUC”), to artificially low prices, which would have an adverse impact on Comsat and other international service providers in the United States.⁶ Antitrust laws will not prevent this behavior since the Signatories, which are often vertically integrated carriers for which the IUC is simply a transfer price, are immune to any potential antitrust liability in the execution of their Signatory related activities.⁷

C&W hereby submits these comments to BTNA’s Petition and the Opposition of Comsat⁸ to the Petitions for Reconsideration and strongly urges the Commission to reevaluate and eliminate this restriction on dominant foreign affiliated Signatories.⁹ In an era where the Commission has advocated the deregulation of foreign affiliated carrier entry in its most recent orders,¹⁰ the Commission appears to have reversed course with this restriction, relying upon pre-WTO policies of market preclusion and discrimination of foreign affiliated entities rather than the open entry policies of these Orders. Further, this restriction should be eliminated because the incentives for these Signatories to act in the perceived harmful manner are nonexistent, existing dominant carrier safeguards and enforcement powers are sufficient to prevent and punish any such acts, and this

⁵ Order at ¶96.

⁶ Order at ¶96.

⁷ Order at ¶97.

⁸ *Opposition of Comsat Corporation to Petitions for Reconsideration* (“Comsat Opposition”), IB Docket No. 98-192, filed January 11, 2000.

⁹ Order at ¶99 (stating “...if our [FCC] competitive concerns regarding dominant Signatories are not likely to be realized, we will reevaluate the decision.”).

¹⁰ See *In re Rules and Policies on Foreign Participation in the U.S. Telecommunications Market; Market Entry and Regulation of Foreign-Affiliated Entities, Report and Order and Order on Reconsideration*, 12 FCC Rcd. 23891 (1997), recon. pending (hereinafter “Foreign Participation Order”); *In re 1998 Biennial Regulatory Review—Reform of the International Settlements Policy and Associated Filing Requirements, Report and Order and Order on Reconsideration*, 14 FCC Rcd. 7963 (1999) (hereinafter “ISP Reform Order”); *In re 1998 Biennial Regulatory Review—Review of International Common Carrier Regulations, Report and Order*, 14 FCC Rcd. 4909 (1998) (hereinafter “Licensing Reform Order”).

restriction disregards the commitments of the U.S. and other countries in the WTO Global Basic Telecommunications Agreement.

I. THE INCENTIVES TO COMMIT THE PERCEIVED ANTICOMPETITIVE ACTS ARE NON-EXISTENT AND DO NOT JUSTIFY THE DENIAL OF DIRECT ACCESS.

C&W agrees with BTNA that no real incentive exists for dominant foreign Signatories to lower the IUC to artificially low levels in order to gain market share in the United States.¹¹ Since the IUC is offered on a nondiscriminatory basis to all users, this cost element in providing international services through INTELSAT would be lowered for all direct access users, including the competitors of the Signatories. The Signatory would be unable to conceivably gain any market share by reducing the IUC for all market participants, and, in fact, would have a disincentive to do so due to the potential loss of revenue as a Level 4 investor in INTELSAT.¹²

Comsat's argument that Signatories would uniquely benefit from the lower IUC to the disadvantage of other providers since most U.S. carriers provide service through non-INTELSAT means, such as submarine cable, defies logic and market behavior.¹³ All parties agree that the IUC is an input to the service and is not an end in itself,¹⁴ and the U.S. international communications marketplace is highly competitive and highly price elastic. There is no evidence that a U.S. carrier, so long as it registered for direct access with the FCC, would be unable to take advantage of any decrease in IUC rates to a lesser degree than that of a dominant foreign Signatory. Further, most Signatories do not have

¹¹ Petition at p. 8.

¹² Petition at p. 10.

¹³ Comsat Opposition at 7.

¹⁴ Order at ¶96.

U.S. affiliates that can exercise market power in a manner that could harm the non-Signatory participants ability to take advantage of the lower IUC.

Similar to the IUC, the Commission's International Settlement Policy ("ISP") dictated uniform accounting rates and nondiscriminatory proportionate return for a number of years.¹⁵ Accounting rates were uniform among all U.S. carriers on every route, and if the rate on a particular route was changed for one carrier then all other U.S. carriers were entitled to the same lower rate. Consequently, no one U.S. carrier had a significant incentive to bargain for lower accounting rates that would equally affect its competitors since this would not result in a competitive advantage to gain market share. Likewise, a reduction in the IUC impacts all direct access providers equally and would not provide an unfair advantage for any one provider to gain market share.

Finally, the Commission cannot simply ignore the fiduciary duties of the Signatories under the INTELSAT Operating Agreement.¹⁶ The Operating Agreement dictates that IUCs shall recover all costs of providing service, thereby providing a safeguard against the theoretical Signatory incentives to set IUCs below cost. Since the Signatories have an obligation to ensure the IUC covers operation and administrative costs, any accusation or rule based on the theory that the Signatories will wholeheartedly violate this duty in concert should be based on strong evidence of such behavior. In this case, no such evidence is presented on the record to justify the Commission's preclusion of foreign affiliated Signatories to direct access, thus the rule should be re-evaluated and eliminated.

¹⁵ The ISP has recently undergone significant changes. See ISP Reform Order, *supra* n. 10.

II. EXISTING DOMINANT CARRIER SAFEGUARDS ARE SUFFICIENT

As mentioned above and in BTNA's Petition, the potential anticompetitive behavior that the Commission uses to justify its prohibition of the foreign affiliated Signatories' direct access to INTELSAT is highly improbable, based on incentives that are counter-intuitive, and a clear violation of the Signatories obligations under the INTELSAT Operating Agreement. The Commission did not justify why its existing rules guarding against anti-competitive behavior by dominant carriers were insufficient and were augmented with a blanket prohibition to direct access by certain providers on these routes. C&W agrees that rather than limiting market participation based on theoretical anti-competitive behavior, the Commission should address actual anti-competitive behavior through the existing competitive safeguards and enforcement powers over Section 214 authorizations and Title III licenses.¹⁷

In the Foreign Participation Order, the Commission amended its dominant carrier regulations to permit dominant carrier entry to most affiliated markets with no competitive restrictions.¹⁸ In that Order, the Commission removed existing requirements that were unnecessarily burdensome and adopted a narrowly tailored dominant carrier framework designed to address specific concerns of anticompetitive behavior.¹⁹ The Commission failed to justify in the Direct Access Order why these restrictions and safeguards are insufficient in the INTELSAT direct access market.

¹⁶ See Operating Agreement Relating to the International Telecommunications Satellite Organization, "INTELSAT," 23 U.S.T. 4091 (August 20, 1971) ("INTELSAT Operating Agreement").

¹⁷ Petition at 14.

¹⁸ See, Foreign Participation Order, *supra* n. 10, 12 FCC Rcd. at 23987, ¶215.

¹⁹ See, Foreign Participation Order, *supra* n. 10, 12 FCC Rcd. at 23991, ¶221.

Additionally, the WTO Global Basic Telecommunications Agreement²⁰ provides certain obligations and safeguards that the Commission should recognize restricts a foreign Signatory from engaging in the anticompetitive behavior discussed. For example, Comsat states any loss of investment revenue of a Signatory due to artificially lowering the IUC could be recuperated in the home market by correspondingly increasing the fees for interconnection into local networks.²¹ Such an abuse of market power through cross subsidization would violate the Reference Paper to which 55 countries have agreed to honor and enforce in their home markets.²² The Commission fails to address these safeguards, why they would be insufficient in the case of direct access, and why it did not consider a system similar to the Section 214 and Title III licensing regimes, which rely heavily on WTO commitments.

III. CONCLUSION

C&W strongly urges the Commission to repeal the direct access restrictions of dominant foreign-affiliated Signatories. The Commission failed to justify these restrictions and did not address why its existing safeguards or case-by-case enforcement were insufficient to prevent such anticompetitive behavior. BTNA's Petition clearly demonstrates the incentives to engage in theoretical anti-competitive behavior are non-existent and, in fact, Signatories have an inverse incentive to ensure the IUCs provide a sufficient return on investment. Finally, the Commission fails to take into account the

²⁰ *World Trade Organization: Agreement on Telecommunications Services* (Fourth Protocol to the General Agreement on Trade in Services) Feb. 15, 1997, vol. 36 no. 2 36 I.L.M. 354 (hereinafter "Basic Telecom Agreement").

²¹ Comsat Opposition at 8.

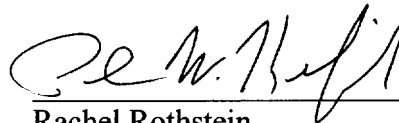
²² See, Foreign Participation Order, 12 FCC Rcd. at 23903, ¶27. The Reference Paper was never formally issued as a WTO document. *Id.*

obligations of the U.S. and foreign member nations to the Basic Telecom Agreement, and it fails to state why these obligations are insufficient to prevent abuse of market power in INTELSAT in the direct access market.

Respectfully submitted,

CABLE & WIRELESS USA, INC.

By:



Rachel Rothstein
Vice President, Regulatory and
Government Affairs
Paul Kenefick
Director, International Regulatory Affairs
8219 Leesburg Pike
Vienna, VA 22182
703-905-5785

January 24, 2000